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Case No. 8020

**IN THE SUPREME COURT
of the
STATE OF UTAH**

STATE OF UTAH,

Plaintiff and Respondent,

vs.

**HUGH LEONARD WOOD, alias
Joseph Earl Martin, alias Joseph
Paul Martin, alias James Walton,**

Defendant and Appellant.

APPELLANT'S BRIEF

**Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Lewis Jones, Judge**

FILED

AUG 2 1953

R. R. HACKETT,

*Attorney for Defendant
and Appellant.*

Supreme Court, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

HUGH LEONARD WOOD, alias
Joseph Earl Martin, alias Joseph
Paul Martin, alias James Walton,

Defendant and Appellant.

Case No. 8020

APPELLANT'S BRIEF

STATEMENT OF THE CASE

The appellant was charged by the State of Utah with the crimes of Grand Larceny and Being an Habitual Criminal, the charges being that he, Hugh Leonard Wood, on or about the 29th day of September, 1952, at the County of Salt Lake, State of Utah, stole from Heusted and Montague, a Corporation, personal property having a value in excess of \$50.00, lawful money of the United States; and that said Hugh Leonard Wood has been previously convicted of four felonies prior to the 29th

day of September, 1952, as follows, to-wit: Burglary in the State of Oregon, where he was sentenced and committed for 3 years in the Oregon State Penitentiary; Burglary in the First Degree in the State of Nevada, where he was sentenced and committed for 1 to 10 years in the Nevada State Penitentiary; Burglary in the First Degree and Prior Conviction in the State of California, where he was sentenced and committed for 5 years to life in the California State Prison; Burglary in the Second Degree and Persistent Offender in the State of Idaho, where he was sentenced and committed for 20 years in the Idaho State Prison.

The appellant was arrested at about noon on the 2nd day of October, 1952, as he was helping load a footlocker into a taxicab at the loading entrance to the Wilcox Hotel in Ogden, Utah by detectives Reeder and Butcher; questioning the taxi driver they learned that there were two more footlockers upstairs in room No. 8, which Butcher and the taxi driver went up and brought down, officer Butcher asked the appellant what he was doing with them and appellant stated that he was taking them to the depot at the request of James O'Neil, an old time acquaintance, who had requested his baggage, consisting of three footlockers in room 8 at the said Hotel be delivered at the depot for shipping. Officer Butcher claimed that appellant said that the footlocker which he was helping load into the taxicab belonged to him, which appellant denied at the trial. The Officers asked appellant what was in the footlocker, and he said he did

not know. The officers then told appellant that he was under arrest, he asked what for, and they told him "possession of stolen property."

That appellant was registered at the Wilcox Hotel, 2470 Kiesel Avenue, Ogden, Utah and occupied room number one at time of his arrest and had occupied said room for the entire month previous to his arrest, that he never occupied room number 8 at the Hotel and that he never had any of his belongings in room 8 at the Hotel.

The State claimed that the three footlockers taken from the Wilcox Hotel contained clothing alleged to have been stolen from Heusted and Montague at Salt Lake City, Utah on or about September 29, 1952. The only evidence produced at the trial was that appellant had momentary possession of a footlocker while assisting cab driver take said footlocker from the Wilcox Hotel to his cab at the rear of the Hotel, which the State claimed contained clothing alleged to have been stolen from Heusted and Montague at Salt Lake City. No evidence was adduced by the State to prove that appellant ever had any footlocker or any stolen property in his possession at the Hotel or any other place, excepting as stated, assisting the cab driver, and appellant denied that he ever had any footlocker in his possession, except as stated above, and no evidence was adduced to show that appellant ever knew what was in the footlocker which he assisted the taxi driver take to his cab.

No evidence was given by State at the trial to prove that appellant was in Salt Lake City on September 29, 1952 and appellant testified that he was not there at that time and that he had not been there for more than six months prior to that time, that he did not steal the property as alleged in the Information and that he did not have anything to do in stealing said property, and that he did not know what the footlocker contained which he assisted taxi driver deliver to his cab.

Appellant contends that considering all the evidence adduced by the State at the trial, that if appellant should have been tried on any charge, he should have been tried for the crime of possession of stolen property in the District Court of Weber County, Utah.

Appellant and Merl Gall were charged with the crime of Grand Larceny in a complaint filed in the City Court of Salt Lake City the first part of October, 1952 and during that month the Grand Larceny complaint was dismissed and another complaint was filed in the City Court of Salt Lake City charging appellant with the crimes of Grand Larceny and Being an Habitual Criminal, charging appellant with having been previously convicted of four felonies as alleged in the Information. (R. Tr. 37-121)

STATEMENT OF ERRORS

The following is a statement of the errors upon which the appellant relies for a reversal of the judgments in this case:

I

The court erred in denying appellant's motion to quash the Information upon the following grounds:

(1) That it does not charge the defendant with the commission of an offense.

(2) That the committing magistrate in this cause did not find that the crimes alleged in the Information were ever committed by the defendant for the reason that no order was made and signed by him requiring the defendant to answer in the District Court of Salt Lake County, State of Utah to the offenses contained in the Information.

(3) That the court trying the cause has no jurisdiction of the offenses charged or of the person of the defendant.

(4) That more than one offense is charged in the Information in a manner contrary to the laws of the State of Utah.

II

The court erred in refusing to grant appellant a Mistrial when during the course of his trial for Grand Larceny the District Attorney over objections of appellant was permitted to cross-examine him on alleged felonies contained in the Information wherein appellant was charged with the crime of Being an Habitual Criminal.

III

(1) The court erred in not sustaining appellant's motion for dismissal of the action made at the time the State rested its case on the trial for Grand Larceny. The motion was made on the grounds of insufficiency of the evidence introduced by the State and failure of proof of the allegations contained in the Information.

(2) The court erred in denying the appellant's motion made at the conclusion of the trial on charge of Grand Larceny, that the court direct the jury trying the case to return a verdict of not guilty, for the reason and upon the grounds that no testimony or evidence was introduced to prove that appellant did steal, take and carry any property from Heusted and Montague at Salt Lake County, Utah; and for the further reason that if the claim that possession of recently stolen property is considered as evidence in this case, then the appellant contends that a sufficient and proper explanation was made of that, so that there was no evidence introduced in this case to prove appellant guilty of Grand Larceny as charged in the Information. The appellant claiming that the State had not introduced sufficient evidence to justify the court in submitting the case to the jury.

IV

Utah's Habitual Criminal Act, Section 76-1-18 Utah Code Annotated 1953, is unconstitutional and void as written, construed and applied; being in violation of and denying appellant's Federal Constitutional right to "Due

Process of Law" as guaranteed by laws and Constitution of the State of Utah and under the Fourteenth Amendment to the Constitution of the United States.

The said Habitual Criminal Statute reads as follows: "Whoever has been previously twice convicted of felonies, sentenced and committed to any prison, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for not less than fifteen years."

The said Habitual Criminal Act is unconstitutional and void as applied in this case when appellant was prosecuted for crimes alleged to have been committed in States other than Utah.

The Information and judgment in this case shows that appellant was prosecuted, tried and convicted and sentenced under the said Utah's Habitual Criminal Statute on charges of four alleged previous convictions of purported "felonies" in other states of Oregon, California, Nevada and Idaho.

Prior to 1951 the Habitual Criminal Statute, Section 103-1-18, Utah Code 1943 used the word "crime" which has a universal legal meaning; but the new statute as revised and re-enacted by Chapter 77 Laws of Utah 1951 used the purely local statutory term "felonies," which in Utah as defined by statute Utah Code 1953, "A felony is a crime which is or may be punishable with death, or by imprisonment in the state prison."

Under our statutory system of law, there is no such thing as a universal common law felony, in these United States, the word felony has no legal meaning; therefore in each and every State its local legal meaning is defined in various ways by State statutes, and applied in varying degrees, only to classify those crimes committed within each State's own Jurisdiction and Borders. And like any other State statutory creation, has no extraterritorial force, meaning or effect in other States, or on any acts committed beyond its borders.

Any alleged offense to be a felony under any Utah Statute must be a crime within the borders and jurisdiction of, under and against the laws of Utah; any alleged previous offenses of whatever local name, in other States and other jurisdictions do not qualify as felonies under any law of the State of Utah.

V

The court erred in permitting District Attorney over objections of appellant to force appellant to testify against himself and to incriminate himself and to furnish the evidence to convict himself on the untried charge of Being an Habitual Criminal while he was on trial for Grand Larceny which is contrary to and in violation of the Habitual Criminal Statute of the State of Utah.

VI

The court erred in denying appellant's Motion in Arrest of Judgment filed and argued in this cause before sentence was passed upon him for the verdicts of the

jury upon grounds as stated in said motion, some of the grounds being, that the court did not have jurisdiction of the offenses charged in the Information or jurisdiction of the person of the appellant; that appellant was denied a fair trial as guaranteed by the Constitution of the United States and the Statutes of the State of Utah for the reason that he was tried and convicted upon four alleged and purported felonies in said trial upon which he had theretofore been found guilty and punished as provided by law in each of said cases, therefore appellant was compelled to suffer double jeopardy in said cases which is contrary to the Statutes of the State of Utah.

VII

The court erred in denying appellant's Motion for a New Trial made upon the grounds of insufficiency of the evidence adduced by the State to support the verdict of the jury; and also upon the grounds of errors made by the court in its instructions to the jury, and errors made by the court in decisions of questions of law during the course of the trial and for acts done and allowed by the court during the course of the trial prejudicial to the substantial rights of appellant.

VIII

The court erred in ignoring and refusing to make any pronouncement or to enter judgment against appellant for the crime of Grand Larceny or to sentence him for the crime of Grand Larceny after the jury returned

a verdict against appellant of guilty of Grand Larceny, before he sentenced him for the crime of Being An Habitual Criminal.

PARTICULAR QUESTIONS INVOLVED

They are as above-stated in the Statement of Errors.

ARGUMENT

POINT NUMBER I

The defendant filed his Motion to Quash the Information in this cause before he had entered his plea to the Information in the District Court which was argued and by the court denied on January 10, 1953 (Tr. 12). The court erred in denying defendant's motion to quash on the grounds that the Information did not charge him with the commission of an offense. The Information did not allege ownership of property alleged to have been stolen. In *State vs. Jensen*, 83 Utah 452, 30 P. 2d 203, the Court held that "Information which did not allege ownership of property taken is fatally defective, since it was necessary in order to charge crime of Larceny to allege that property belonged to some one other than defendant.

The court erred in denying defendant's motion to quash on grounds that committing magistrate did not find that the crimes alleged in the Information were ever committed by defendant for the reason that no order was

made and signed by him requiring defendant to answer in the District Court of Salt Lake County, State of Utah, to the offenses contained in the Information.

Section 77-15-19, Utah Code 1953, District court does not require jurisdiction over defendant as a result of original complaint, but rather from the binding over of defendant by magistrate.

State vs. Freeman, 93 Utah 125, 71 P. 2d 196.

That the court trying the cause has no jurisdiction of the offenses charged or of the person of the defendant.

That more than one offense is charged in the Information in a manner contrary to the laws of the State of Utah (R. Tr. 12).

The last two statements are argued elsewhere in this Brief.

POINT NUMBER II

The court erred in refusing to grant appellant a Mistrial when during the course of his trial for Grand Larceny the District Attorney over objections of appellant was permitted by the court to cross-examine him on alleged felonies which he was alleged to have committed and which were contained in the Information, being the charges filed against appellant in the Information charging him with BEING AN HABITUAL CRIMINAL (Tr. 123).

The conduct of the District Attorney was in total disregard of the rights of appellant on trial of the crimes of Grand Larceny and Being an Habitual Criminal and in direct violation of the laws of Utah in Criminal Procedure in trials of criminal cases and in direct violation of Section 76-1-19, Utah Code 1953, Procedure in charging and trying a person charged with being an habitual criminal the jury shall not be told of the previous convictions of felony and the trial on the felony committed within the State of Utah shall proceed as in other cases.

The jury was so prejudiced by the District Attorney showing that appellant was guilty of Being an Habitual Criminal while on trial on the untried charge of Grand Larceny that they could not give appellant a fair trial for the crime of Grand Larceny for which he was on trial at that time.

The court erred in permitting District Attorney over objections of appellant to force appellant to testify against himself, and to incriminate himself, and to convict himself on the untried crime of Being an Habitual Criminal while he was on trial for the crime of Grand Larceny, which is in violation of the laws of the State of Utah and the Habitual Criminal Statute of Utah (R. Tr. 121-139).

POINT NUMBER III

The motions made by appellant for dismissal of the action for Grand Larceny when the State rested its case and that the court direct the jury to return a verdict of not guilty of Grand Larceny at the conclusion of the trial, are being grouped as practically the same errors are complained of in both of the motions stated in Statement of Errors Number III.

When the State rested its case for Grand Larceny, appellant moved the court for a dismissal of the action upon the grounds that the evidence adduced by the State was insufficient to prove that the crime of Grand Larceny had been committed by appellant as alleged in the Information and Bill of Particulars filed in this action. The State had not proved that appellant on or about September 29, 1952 at Salt Lake County, Utah, did steal, take and carry away from Heusted and Montague personal property having a value in excess of \$50.

The court erred in denying appellant's motion for dismissal of the action.

(Where referring to Reporter's Transcript we have called the same "R. Tr." and refer to rest of file as "Tr.")

There was an absolute "failure of proof" by the State to connect appellant in any way with the alleged larceny as stated in Information. No evidence was introduced at the trial to show that appellant was in Salt Lake County at time alleged in the Information — and

appellant testified at trial that he was not in Salt Lake County at time alleged and that he had not been in Salt Lake County for more than six months previous to that time.

It was held in case of *State v. Whitely*, 100 Utah 14, 110 P. 2d 337 that in all cases where the presence of the accused is necessary to render him responsible, the state must prove as a part of its case that he was there, and if from all the evidence there exists a reasonable doubt of accused's presence, he should be acquitted.

All the evidence produced at the trial against appellant was that he had momentary possession in assisting cab driver take a footlocker down stairs at the Wilcox Hotel, Ogden, Utah, which State claimed contained some stolen clothing. Appellant stated that he did not know what the footlocker contained — no evidence was produced to prove that appellant knew the footlocker contained stolen property. Officers testified that they asked appellant who the footlocker belonged to, and they stated that he said it belonged to him, which he denied at the trial and he testified that he told officers he was taking footlocker to the train depot for James O'Neil who had occupied room number 8 at the Wilcox Hotel, who had requested that he have it taken to the depot for him (R. Tr. 116, 117, 118).

The officers informed appellant that he was under arrest, he asked what for, and they told him "possession of stolen property."

Appellant contends that if he was to be prosecuted and tried for any offense, it should have been for possession of stolen property, and should have been tried where found and arrested, in District Court of Weber County, Utah.

There never was a single bit of evidence produced to prove appellant guilty of Grand Larceny in Salt Lake County as alleged in the Information, but the State relied on that provision in the Larceny Statute to-wit: "possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt."

Appellant contends that that provision of the larceny statute is unconstitutional and void, for the reason that it compels the person on trial for larceny to prove his innocence.

The Supreme Court of the United States in 1933 under the "Due Process of Law" clause of Section 1 of the 14th amendment to the Constitution of the United States held: That proof to any element of a criminal charge, or guilty knowledge thereof cannot be presumed and the burden of proof cannot be put upon the defendant to disprove any element of the crime. Referring to case of *Morrisson vs. California*, 291 U. S. 82-90, 54 S. Ct. 281-283, wherein the Supreme Court of the United States held California's Alien Land Law to be unconstitutional.

The mere admission by appellant that the footlocker belonged to him, which he was assisting cab driver take down stairs of Wilcox Hotel, would not, with the other evidence adduced at the trial support the conviction for Grand Larceny. *State vs. Nichols*, 106 Utah 104, 145 P. 2d 802.

Possession of goods recently stolen in connection with burglary does not in itself create a presumption, or amount to prima facie proof, that the possessor is guilty of burglary. After proof that defendant in a prosecution for burglary accompanied by theft has possession of stolen goods soon after the crime, he is not required to show that he obtained the goods "fairly and honestly," but if explanation is required it need go no further than to show that possession was not acquired through complicity in the particular crime of which defendant is accused.

As the burden of proof in a criminal case can never shift, an instruction that the showing of a specific fact is prima facie evidence of guilt, or raises a presumption of guilt, is inaccurate, as leading the jury to think that proof of such a fact casts upon defendant the burden of proving his innocence. *State vs. Brady*, 91 N. W. 801 (Iowa 1902)

The State did not supply evidence necessary to connect appellant directly with the offense charged.

State vs. Harcombe, 78 Utah 89, 158 P. 1096;

State vs. Pomeroy, 85 Utah 91, 38 P. 2d 751;

State vs. Petit, 97 Utah 443, 93 P. 2d 75.

The State must prove the case and bear the "Burden of Proof" as to every essential element of the crime throughout the trial.

State vs. Mannion, 19 Utah 505, 57 P. 542;

State vs. McCune, 16 Utah 170, 51 P. 818;

State vs. Whitely, 100 Utah 14, 110 P. 2d 337;

Morrisson vs. California, 291 U. S. 82, 90, 54 S. Ct. 281, 287;

State vs. Barretta, 47 Utah 479, 155 P. 343.

(R. Tr. 16-121.)

POINT NUMBER IV

The court erred in compelling appellant on go on trial on the charge of Being an Habitual Criminal on the grounds that the said Habitual Criminal Act of Utah is unconstitutional as written, construed and applied, being in violation of and denying appellant's Federal Constitutional right to "Due Process of Law" by laws of Utah and the Constitution of the State of Utah and under the Fourteenth Amendment to the Constitution of the United States Section one.

The said Habitual Criminal Statute reads as follows: "Whoever has been previously twice convicted of felonies, sentenced and committed to any prison, shall, upon conviction of a felony committed in this State . . . be deemed to be An Habitual Criminal and shall be punished by imprisonment in the State Prison for a term not less than fifteen years."

The Information and judgment in this case shows that appellant was prosecuted, tried and convicted and sentenced under the said Utah's Habitual Criminal Statute for the offenses of four alleged previous convictions of purported "felonies" in other states of Oregon, California, Nevada and Idaho.

Appellant contends that this Utah Statute does not in any way include any such alleged previous convictions of crimes in other states within its provisions but is restricted as a matter of law to previous convictions of felonies in the State of Utah.

The said Habitual Criminal Statute is unconstitutional and void as applied in this case when appellant was prosecuted for crimes alleged to have been committed in States other than Utah.

Although such previous convictions may have been included in Utah's former Habitual Criminal Law, Utah Code 1943 Section 103-1-18 because it read as far as pertinent here as follows: "Whoever has been previously twice convicted of crime, sentenced and committed to prison, in this or any other state, for terms of

not less than three years each, shall, upon conviction of a felony committed in this state be deemed to be an habitual criminal." But in 1951 the Legislature struck out and abolished these provisions as to Crime and Any Other State, completely from the 1943 Habitual Criminal Statute and restricted the terms of Utah's Habitual Criminal Statute to previous convictions of felonies in the State of Utah.

Boyd vs. Smyth, 200 Iowa 687, 205 N.W. 522, 43 A.L.R. 137. Defendant in this case was tried for receiving stolen property, the Supreme Court in that case held: "It is settled law that, where statutes are revised and some parts of the original are omitted, the parts omitted cannot be revived by construction but are considered annulled." 36 Cyc. 1080.

Prior to 1951 the Habitual Criminal Statute used the word "Crime" which has a universal legal meaning, but our present statute as revised and re-enacted by Chapter 77 Laws of Utah 1951 uses the purely local statutory term "felonies". Under our statutory system of law, there is no such thing as a universal common-law felony, which when it existed was an offense punishable by death. In these United States the word "felony" has no legal meaning; therefore in each and every state its local legal meaning is defined in various ways by state statutes only to classify those crimes committed within each State's own jurisdiction and borders, and like any other State Statutory creation, has no extra-territorial force, meaning or effect in Other States, or

on any acts committed beyond its borders. Therefore, any alleged offense, in order to be a "felony" under any Utah Statute, must be a crime within the borders and jurisdiction of, under and against the laws of Utah; and any alleged previous offense, of whatever local name, in Other States and jurisdictions, do not qualify as felonies under any law of the State of Utah.

In the instant case, the Supreme Courts of each of the States in which the alleged previous convictions occurred, Hold that their Statutory "Felony" has no meaning beyond their borders and jurisdiction.

In re Biggs, 52 Oregon 433, 97 P. 713. In the absence of statute the term "felony" is not descriptive of any offense.

In re Dampier, 46 Idaho 195, 267 P. 452, which cite California and Nevada cases; In re Felton, 60 Idaho 540, 94 P.2d 166.

Appellant submits that these decisions of other states are binding on their statutes.

It must be presumed that the Legislature meant to change the Statute as it did, so that it now applies only to persons previously convicted of crimes termed "felonies" committed in and punishable in the State of Utah.

If any Statute of any jurisdiction is meant to include any act in any of the Other States of the United States within its terms, it must, in exact words, use the

classical definition — “Any Other State” or any of The States to include them, for otherwise, as here, the Statute excludes them.

Twin Falls vs. Hulbert, 66 Idaho 128, 156 P.2d 319, 66 S.Ct.444. The classical designation to clearly indicate the states as individual governmental entities making up the United States dating from the Constitution and coming down through various Acts of Congress and pronouncements of the courts is the word “States”.

A penal Statute can reach no further than its words, no person can be made subject to them by implication.

Appellant submits that it is necessary under the well established principle of Criminal Law, that any Statute must state in direct words all that its terms are meant to include, or be held Unconstitutional for lack of “Notice” under the Due Process of Law clause of the Fourteenth Amendment to the Constitution of the United States.

In Conclusion, appellant submits that the alleged previous convictions of a number of purported “felonies” in Other States, are not within either the words or legal meaning of Utah’s Habitual Criminal Statute and that as arbitrarily construed and applied against the appellant by the State to convict and punish him under it, that it violates in toto Federal Constitutional Rights to lawful “Notice” and to “Due Process of Law”; and that the said Habitual Criminal Statute by being so construed and applied is thereby lacking in law-

ful "Notice" as written and is Unconstitutional, Null and void under the Laws and Constitution of the State of Utah and the "DUE PROCESS OF LAW" clause of Section One of the Fourteenth Amendment to the Constitution of the United States, and it should be so Declared.

POINT NUMBER V

The court erred in permitting District Attorney over objections of appellant to force appellant to testify against himself and to incriminate himself and to furnish the evidence to convict himself on the untried case of Being An Habitual Criminal while he was on trial for Grand Larceny which is contrary to and in violation of the Habitual Criminal Statute of the State of Utah.

As far as pertinent here, the Habitual Criminal Statute is as follows: "The jury shall not be told of the previous convictions of felony and the trial on the felony committed within the State of Utah shall preceed as in other cases".

Not only did this action of the State deprive appellant of his Constitutional right to a trial by a fair and impartial jury, Constitution of Utah, Article 1, Section 12 and Utah Code 1953 Section 77-1-8, but it also forced appellant to testify against himself and furnish the evidence against himself to convict him of the crime of Being An Habitual Criminal before the jury on the

untried crime of Being an Habitual Criminal while he was on trial for Grand Larceny. It cannot be contended that it was cross-examination on the charge of Being An Habitual Criminal for the reason that appellant was at that time on trial for Grand Larceny. (Tr. 121-143).

POINT NUMBER VI

The court erred in denying appellant's Motion in Arrest of Judgment filed and argued in this cause before sentence was passed or judgment entered against appellant for the verdicts of the jury upon grounds as stated in said motion, some of the grounds being, that the court did not have jurisdiction of the offenses charged in the Information or jurisdiction of the person of the appellant; that appellant was denied a fair trial as guaranteed by the Constitution of the United States Fourteenth Amendment Section one, Constitution of Utah, Article 1, Section 12 and Utah Code 1953 Section 77-1-8. And further that appellant was tried and convicted upon four alleged and purported felonies in said trial upon which he had theretofore been found guilty and punished as provided by law in each of said cases, therefore appellant was compelled to suffer double jeopardy in said cases which is contrary to the Statutes of the State of Utah. (R. Tr. 191-192)

POINT NUMBER VII

The court erred in denying appellant's Motion for a New Trial made upon the grounds of insufficiency of the evidence introduced by the State to support the verdict of the jury; and also upon the grounds of errors made by the court in its instructions to the jury, and errors made by the court in decisions of questions of law during the course of the trial and for acts done and allowed by the court during the trial prejudicial to the substantial rights of appellant. (R. Tr. 189)

On the Point of insufficiency of the evidence to support the verdict of the jury, appellant refers to his arguments in Point Number III to support his argument on that Point.

Appellant excepted to court's instruction two and seven for the trial of Grand Larceny (R. Tr. 141), the said instructions were prejudicial to appellant's rights to a fair trial. Appellant especially objects to that part of Instruction Number two, as follows: "That thereafter the defendant was found in possession of the recently stolen goods and if you also find that the defendant failed to give a satisfactory explanation of his possession, there would arise an inference that the defendant committed the larceny himself." (R. Tr. 171, 172)

Appellant contends that instruction as given by the court was just the same as if the court had instructed the jury to bring in a verdict of guilty of Grand Larceny.

As to errors committed by the court of questions of law during trial and for acts done and allowed by the court during trial prejudicial to the substantial rights of appellant, appellant refers to his argument under Points II and V to support his argument on those points. (R. Tr. 121-143).

POINT NUMBER VIII

The court erred in the matter of not entering judgment against appellant and sentencing him for the crime of grand larceny after the jury returned a verdict of guilty of Grand Larceny before he sentenced appellant for the crime of Being An Habitual Criminal.

It requires no quotation of authority to state without contradiction that no person can be punished and imprisoned except as provided by statute in the State of Utah.

Utah's Habitual Criminal Statute provides that before a person can be found guilty of Being An Habitual Criminal he must be convicted of a felony committed in this state. Appellant contends that the said conviction for Grand Larceny was not complete until judgment had been entered and appellant had been sentenced for the crime of grand larceny. (R. Tr. 197)

Appellant further contends that the judgment entered in this cause against appellant for having been found guilty of the crime of Being An Habitual Criminal and the sentence given that appellant serve fifteen years in the State Prison for said crime are null and void for

the reason that they are not based upon law and that they should be set aside and the appellant discharged.

The trial court showed that it rejected and refused to consider the verdict of the jury which found appellant guilty of the crime of Grand Larceny when the court drew a line through the words "Grand Larceny" contained in Certificate of Probable Cause and scratched those words out of said Certificate together with the letter "s" in word crimes contained in the said Certificate filed in this cause. (Tr. 199)

From a consideration of the entire proceedings, it is manifest, I submit that the trial court erred in the respects herein pointed out and that the judgments of conviction should be reversed, and the case remanded to the trial court with instructions to dismiss the case and discharge the appellant.

Respectfully submitted,

R. R. HACKETT,

*Attorney for Defendant
and Appellant.*